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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 255.

LOUIS E. RODDEWIG, as Chairman of the Iowa State Board of Assessment and Review, etc., et al.,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
Respondent.

BRIEF OF RESPONDENT.

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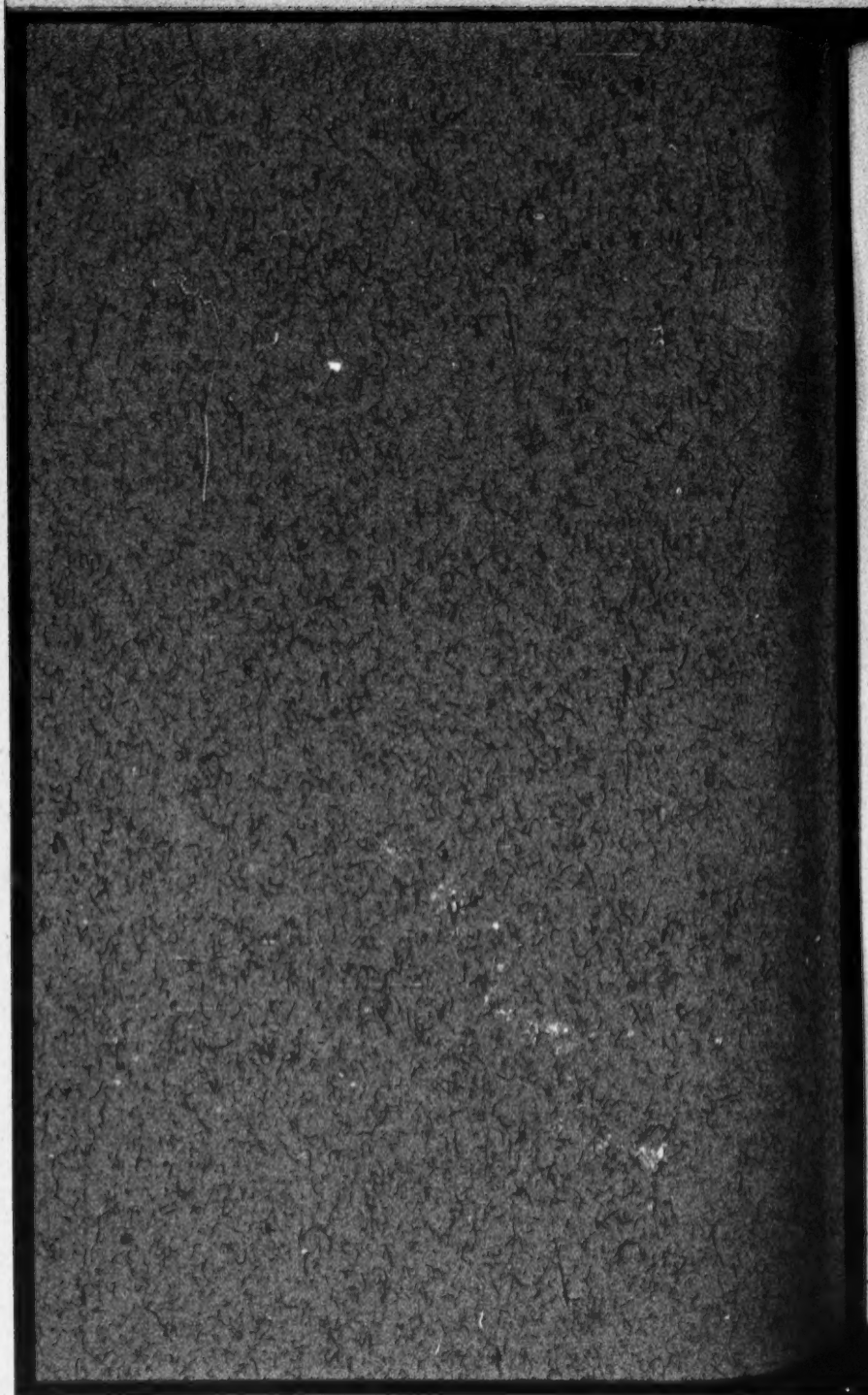

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Respondent.

BRIEF OF RESPONDENT.

Opinion of the Court Below.

The opinion of the Supreme Court of Iowa in this case is reported in 292 N. W. page 130 and appears also in the printed transcript of record on pages 88 to 102, inclusive.

STATEMENT OF THE CASE.

The Issues.

This suit sought to enjoin the petitioners, as members of the Iowa State Board of Assessment and Review, from enforcing as against respondent, Sears, Roebuck and Co., insofar as its purely interstate mail order sales to residents of Iowa are concerned, the provisions of Chapter 198 of

the Laws of the Forty-seventh General Assembly of Iowa which also appear as Chapter 329.4 of the Code of Iowa 1939, commonly known and hereinafter referred to as the "Iowa Use Tax Act"; and also from taking steps to cause the revocation of its permit to do business within the State of Iowa as a foreign corporation or to cancel licenses which had been issued to it as a retail merchant in connection with the operation of its twelve retail stores in Iowa.

The petition (R. 1-24) was based upon the claim that the Iowa Use Tax Act as applied to the interstate mail order business of respondent operated extra-territorially and regulated activities of respondent performed wholly without the confines of the State of Iowa and imposed in legal effect a tax upon the gross receipts of respondent from merchandise sales completely consummated outside the state, and was therefore unconstitutional and void because in contravention of the provisions of the Constitution of the United States and particularly of the Fourteenth Amendment thereto which provides that no state shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the law; and, further, that said act as applied to the interstate mail order business of respondent burdened and impaired the free flow of interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States which invests the Congress with exclusive power to regulate commerce with foreign nations and among the several states.

The petitioners' answer (R. 26-35) claimed that the act, when construed together with the Iowa Sales Tax Act, imposed no burden upon interstate commerce and was not otherwise unconstitutional.

How the Issues Were Decided.

The State District Court, pursuant to an opinion announced on December 21, 1938 (R. 62), granted a permanent injunction in accordance with the prayer of the petition (R. 80). The opinion of the District Court found that the challenged provisions of the Iowa Use Tax Act, as applied to the interstate mail order sales of respondent to residents of the State of Iowa, offended the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as the Commerce Clause thereof.

An appeal from such judgment was prosecuted by petitioners to the Supreme Court of Iowa and that court on May 14, 1940 rendered its decision (R. 88) finding and holding that the said Iowa Use Tax Act as construed and administered by petitioners constituted a regulation of its activities outside the state and was therefore violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and, further, that said act as construed and administered by petitioners and as applied to the mail order business of respondent, whose activities in connection therewith were performed wholly without the State of Iowa, constituted a regulation of and substantial burden upon and impairment of the free flow of interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

Pertinent Provisions of the Act.

Certain provisions of Chapter 329.4, Code of Iowa, 1939, commonly known as the Iowa Use Tax Act, as applied to respondent's mail order business, are here involved. These provisions are reflected in Section 6943.109, which provides that retailers maintaining a place of business in the state and making sales of tangible personal property for use in the state "shall at the time of making such sales, *whether*

within or without the state, collect the tax imposed * * *". (Italics ours)

Section 6943.112 provides that "the tax herein required to be collected by any retailer pursuant to Section 6943.109 * * * shall constitute a debt owed by the retailer to this state".

Section 6943.122 provides that whenever the retailer maintaining a place of business in Iowa is a foreign corporation authorized to do business in Iowa, and said corporation fails to comply with the provisions of the Act, then the corporation's permit to do business in Iowa as a foreign corporation shall be revoked, and also its licenses as a retail merchant may be canceled.

Statement of Facts.

Respondent, Sears, Roebuck and Co., is a corporation organized under the laws of the State of New York with its principal operating office in the city of Chicago, Illinois, and is engaged in the business of retail merchandising (R. 1, 26).

In 1928 respondent applied for a permit to do business in the State of Iowa as a foreign corporation and such permit was issued to it and has never been revoked (R. 2, 3, 26). In connection with the application for such permit to do business as a foreign corporation, respondent paid to the Secretary of the State of Iowa the sum of $50.00 (R. 2, 26), and subsequently respondent reported increases in the amount of its capital employed in the State of Iowa and paid to the Secretary of State substantial sums on account thereof (R. 3, 26).

After the issuance of said permit to transact business as a foreign corporation, respondent commenced to conduct a retail merchandising business in the State of Iowa by opening and operating at twelve separate points retail de-

partment stores wherein it sells extensive lines of merchandise (R. 3, 26).

Such retail stores in Iowa are classified with reference to size and types of merchandise carried. There is one A. store, which is the largest store and carries a complete line; seven B-1 stores, and four B-2 stores (R. 55).

Respondent entered into long-time leases covering the locations in which it conducts said retail business, all of which extend for a substantial period of years. The majority of the leases for the larger stores within the State of Iowa are for periods of ten to twenty years, and all of said leases have a number of years yet to run. Said leases are not subject to cancellation, and respondent is obligated to continue payments of rental thereunder (R. 3, 26).

Respondent has expended large sums of money in equipping said stores with furniture, fixtures and appliances necessary for the conduct of retail department stores, and has stocked said stores with extensive lines of merchandise. Its investment in furniture, fixtures, equipment and stocks in the State of Iowa exceeds the sum of $500,000.00, and its liability upon the unexpired terms of leases entered into amounts to many thousands of dollars (R. 3, 26).

After the passage of Chapter 196 of the Laws of the Forty-seventh General Assembly, known as the "Iowa Retail Sales Tax Act", respondent applied for and procured from the Iowa State Board of Assessment and Review licenses for each of its said stores, which licenses are in full force and effect (R. 4, 26, 27, 28).

Sales of tangible personal property to persons within the State of Iowa at the said twelve retail stores of respondent are made in two methods (R. 36).

First:

Type 1. DIRECT SALES. Sales made in its retail stores located within the State of Iowa of such property out of the stock of said store, payment therefor being made to

said store by the purchaser, and such sales being subject to the Iowa Sales Tax.

Respondent has collected the retail sales tax on account of said direct sales and paid the same, in accordance with the Iowa Retail Sales Tax Act, to the State of Iowa (R. 4, 26, 27, 28).

Second:

Type 2. SPECIAL ORDER—SHIP DIRECT SALES. This method of sale is followed where a purchaser orders from one of respondent's retail stores in Iowa tangible personal property which is not carried by the store in stock, but which is carried by one of respondent's mail order establishments located outside of the State of Iowa. In this type of sale the order for the purchase is given to the local store, and payment therefor, including transportation charges from the shipping point, is made to the local store. The local store then orders shipment of the goods purchased to be made directly to the purchaser from one of respondent's mail order establishments; and the mail order establishment fills the order, charging the local store with the cost price of the goods, plus an amount to cover overhead expense in handling and shipping, plus the actual transportation charges. The purchase price paid to and received by the local store is retained by it and included in the volume of its gross sales.

* * * * *

On June 2, 1938 respondent made to the Iowa State Board of Assessment and Review Retailers' Use Tax Returns for the quarterly periods ending June 30, 1937, September 30, 1937, December 31, 1937, and March 31, 1938; and at the same time paid to said Board the sum of $7,853.02. Said returns purported to show, and the sum of money thus paid purported to be, the correct amount of the use tax exacted under the terms and provisions of the Iowa Use

Tax Act for the periods mentioned in said returns, for sales of tangible personal property identified as Type 2, Special Order—Ship Direct Sales, and also the use tax exacted on account of tangible personal property purchased by respondent outside the State of Iowa but used by it within the State of Iowa and subject to the Iowa Use Tax Act (R. 38). The aggregate sales of respondent's retail stores located in the State of Iowa in the year 1936 amounted to $5,080,000.00, and for 1937, $5,600,000.00 (R. 60).

Respondent also maintains certain establishments where sales are made by the mail order method. It has such mail order stores in Chicago, Illinois, Minneapolis, Minnesota and Kansas City, Missouri, but no mail order stores in Iowa (R. 55). In the conduct of its mail order business, respondent mails catalogs to prospective purchasers, and in 1937 mailed to residents of the State of Iowa approximately 600,000 small catalogs and 427,000 large catalogs (R. 55, 84). Respondent also mails bulletins soliciting orders (R. 55), and the mailing of these catalogs and bulletins is the sole means of respondent for securing said mail order business (R. 84).

In making said mail order sales, respondent follows the following method:

Type 3. MAIL ORDER SALES (R. 37).

In this type of sale the purchaser, a resident or person in Iowa, after preparing his order or having it prepared for him, sends to one of respondent's mail order establishments located outside of Iowa a written order for the purchase and delivery to him in Iowa of one or more items of tangible personal property listed and priced in respondent's mail order catalogs, the order being accompanied by the remittance of the purchase price plus transportation charges, and the means of transportation being customarily specified by the purchaser. The order is accepted or rejected, as the case may be, at the mail order establishment of respondent which received the order; and if the order is accepted it is

filled by the direct shipment of the property purchased from said mail order establishment to the purchaser in the State of Iowa, delivery being accomplished through the United States mails or some common carrier of goods, such as specified by the purchaser.

The merchandise carried in the mail order stores differs from the merchandise carried in the retail stores in the range of items and character of merchandise carried (R. 55). Respondent carries approximately 59,000 items in the mail order stores and an A. retail store would carry about 19,000 items, and a B-1 retail store would average about 12,000 items and a B-2 retail store about 9,000 items (R. 56). The smaller the retail store the larger the proportion of items carried is the same as the mail order items. In a B-2 store approximately 70% of the said 9,000 items would be the same as respondent quotes in the catalog; in the B-1 store approximately 60% of the said 12,000 items, and in the A. store, such as that located in Des Moines, probably 45% of the said 19,000 items would be the same (R. 56). None of the stores which respondent has in Iowa contains sufficient space to successfully carry on therein a mail order business. The retail store located in Iowa gains no benefit and the manager's earnings are not affected by business coming from orders mailed by customers from Iowa to the mail order plants (R. 57). Respondent prepares merchandise lists which are sent to the retail stores in Iowa (R. 56) from which each individual store makes its selections of the items it will carry in that store (R. 84, 85). Most orders which are received in the mail order houses from residents of the State of Iowa (R. 85) contain more than one item, and it would be impossible for a retail store to fill more than an exceedingly small percentage of the multiple item orders (R. 56).

Respondent receives a large number of mail orders each day and puts them through its mail order plants on a time

schedule, and there is no allowance or arrangement for withholding orders from their schedule. It would substantially increase the cost of operating respondent's business to hold such orders in suspension and would require a major rearrangement of the character of the business (R. 57). Respondent endeavors to get out 100% of the orders the same day as received and comes within a small percentage of accomplishing this. Price and speed of delivery are all-important in the mail order business (R. 59).

Respondent does not keep any individual account of mail order shipments to residents of the State of Iowa from the three plants located outside of the state. The approximate amount of those sales in a given year can be arrived at, however, by what is termed the "advance cash ratio" (R. 59, 60). Using the advance cash ratio method, the amount of mail order sales in Iowa shipped from the Chicago, Kansas City and Minneapolis stores for the year 1937 was approximately $5,400,000.00. Of that amount $2,280,000.00 represented shipments from the Chicago plant, $1,140,000.00 from the Kansas City plant, and $2,000,000.00 from the Minneapolis plant (R. 60). In 1936 mail order sales to Iowa customers from the Chicago mail order house were $2,400,000.00, from the Kansas City mail order house $1,200,000.00 and from the Minneapolis mail order house $2,250,000.00 (R. 60). The aggregate of the three was approximately $5,900,000.00 (R. 87). Based on the general catalog distribution there were some 300,000 customers of respondent's mail order houses (R. 60), in the State of Iowa (R. 87), and in the year 1937 there were approximately 1,200,000 orders received from Iowa customers (R. 60).

Spiegel's, Incorporated, located in Chicago, Illinois, is engaged in the mail order business selling household furniture and wearing apparel. That company distributes catalogs to prospective customers twice a year and such catalogs are sent to people who are residents of Iowa (R. 54),

and it has been doing so for many years (R. 84). That company maintains no place of business within the State of Iowa but gets its orders by mail from customers, delivering to purchasers mainly through parcel post or freight. All shipments are made from Chicago, the company's only place of business. During the past year sales made to Iowa residents by Spiegel's, Incorporated amounted to approximately one and a quarter million dollars upon which no use tax was collected (R. 54, 55). Spiegel's, Incorporated has never made application to be designated as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act (R. 55).

The Chicago Mail Order House is located in Chicago and engaged in the mail order business and it likewise distributes catalogs and its business is conducted under the usual mail order method (R. 56).

National Bellas Hess Company is located in Kansas City, Missouri and its business is the same as the Chicago Mail Order House (R. 56).

The Jim Brown Fencing Company is located at Adrian, Michigan and it sells by mail order heavy lines such as hardware, mechanical lines, fencing, etc., and it sells by means of catalogs (R. 56).

Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fencing Company has any establishments in the State of Iowa, but all are in direct competition with respondent (R. 56).

Neither the Chicago Mail Order House, the National Bellas Hess Company, nor the Jim Brown Fencing Company had registered as a withholding agent under the provisions of Section 9 of the Iowa Use Tax Act (R. 43).

Assuming that neither Spiegel's, Incorporated, nor the Chicago Mail Order House, nor the National Bellas Hess Company, nor the Jim Brown Fencing Company collected 2% of the purchase price for use tax on sales made to resi-

dents of Iowa and the respondent did collect such 2% use tax, then the mail order business of respondent would be seriously impaired through this 2% differential (R. 56, 57).

Illinois has a sales tax and respondent undertakes to collect that tax from its Illinois customers (R. 57, 85), and in so doing respondent includes on the cover of its catalogs a notice to Illinois customers requesting them to include an amount to cover that tax and giving a schedule of the amount required for various amounts of orders. At the beginning, something less than one-half sent any tax at all, and today the percentage has grown from 1933 until approximately 65% of respondent's orders include an allowance for such a tax. Where orders are not accompanied by an amount to cover the sales tax in Illinois, respondent fills the order and sends the customer a "Due Us" slip requesting payment of the difference. It does not hold up the orders as this would be impossible from the standpoint of the operation of the plant (R. 57). Respondent's experience is that it collects not more than 35% of the value of such "Due Us" shortages. Assuming that upon sales to residents of the State of Iowa through mail order the use tax as applied would amount to $100,000.00 per year, then, based upon respondent's experience in the State of Illinois, the maximum amount that could be collected would be around $68,000.00. To do that would entail a direct cost within respondent's business of approximately $13,700.00, and in addition respondent's customers would be subjected to an extra expense in making such remittances (R. 85).

The foregoing statements of cost are predicated upon the assumption that respondent would put a similar notice on its catalogs, which has been described as being used in Illinois, requesting the customer to remit with his order the amount of the tax. If such notice was not placed on the catalog, collections of the use tax on shipments to customers in the State of Iowa would not exceed $35,000.00,

leaving the balance uncollectible, and respondent's cost involved would be approximately $18,000.00 on the assumption that such use tax would amount to approximately $100,000.00 a year (R. 85).

It took respondent five years to reach the 65% of collections of the Illinois tax and it has employed no new technique in the matter of the collection of the tax (R. 58). It is merely the matter of educating hundreds of thousands of people (R. 86).

Ordinarily there is an amount included in the remittances accompanying orders to cover transportation charges on the goods ordered (R. 86). Sometimes the remittance is short, in which event respondent generally does not hold up the shipment but sends along with the shipment a "Due Us" or a "You Owe Us" form for the shortage (R. 60). Respondent has employed this practice in an effort to collect deficiencies of that sort, but has not been able to make all of those collections. Its experience is that approximately of the "Due Us's"——those amounts less than twenty-five cents—respondent receives approximately 36%, whereas of the larger amounts approximately 70 to 75% is collected (R. 86, 87).

Respondent has not collected from the purchasers to whom mail order sales as hereinbefore defined have been or are being made, the so-called use tax imposed by the Use Tax Act of the State of Iowa (R. 37). Respondent concedes as a fact that it is obligated to collect from the purchaser and remit to the State of Iowa either the sales tax or the use tax imposed on all types of sales made by it to residents of or persons within the State of Iowa, excepting on mail order sales hereinbefore defined as Type 3 (R. 38).

On March 20, 1938 petitioners, as members of the Iowa State Board of Assessment and Review, adopted a resolution (R. 10, 26, 18 to 23), advising respondent that unless it complied with all of the terms of Section 8 of the said

Iowa Use Tax Act, which required the collection of the said use tax on sales to residents of the State of Iowa, "*at the time of making such sales whether within or without the state,*" that said petitioners as such Board would take the necessary steps to revoke respondent's permit to do business in the State of Iowa as a foreign corporation and to cancel the licenses to transact business as a retailer at each of its twelve retail stores within the State of Iowa.

Summary of Pertinent Important Items.

The foregoing facts are not substantially disputed. Indeed, the most of them were stipulated by the parties. For the convenience of the court, some of the more important items of fact may be summarized as follows:

1. The threatened action of the Board of Assessment and Review, which was enjoined, was the cancellation of respondent's permit to do business in Iowa as a foreign corporation and the revocation of its licenses as a retail merchant in connection with its twelve retail department stores located within the state.

2. The breach of the statute on which such threatened action was predicated concerned only sales made by respondent's mail order houses located outside the state, in which instances title to the goods so sold was transferred and delivery made to the purchaser by shipment by mail or other common carrier service as designated by the purchaser, delivery to such carrier being effected outside the State of Iowa.

3. No act of respondent or of any of its agents performed within the State of Iowa had anything to do with the sales on which the use tax was not collected.

4. Such mail order sales were made in direct competition with other mail order merchants who did not maintain any place of business in the State of Iowa and who were not licensed in the State of Iowa.

5. The collection of the use tax on such mail order sales at the time of making the same without the State of Iowa would entail large loss and expense upon respondent.

6. Respondent has collected, reported and paid the use tax with respect to sales made in each of its retail department stores located in the state even though the goods so sold were shipped to the purchaser from without the State of Iowa.

7. Every single transaction involved in respondent's mail order sales from its mail order establishments in Chicago, Illinois, Minneapolis, Minnesota and Kansas City, Missouri to residents of the State of Iowa, is a transaction in interstate commerce.

SUMMARY OF THE ARGUMENT.

I.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Violate the Fourteenth Amendment to the Constitution of the United States Because of Their Extra-Territorial Operation.

A. The collection and payment provisions of the Iowa Use Tax Act operate extra-territorially.

Sections 2, 8, 11 and 21, Chapter 198 of the Acts of the Iowa Forty-seventh General Assembly (Iowa Use Tax Act).

B. The mail order sales of respondent do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from respondent's activities in Iowa.

Sears, Roebuck and Co. v. Roddewig, (Iowa) 292 N. W. at 135.

C. In cases coming from a state court this court does not review questions of fact but accepts the conclusions of the state tribunals as final.

Chrisman v. Miller, 197 U. S. 313; 49 L. Ed. 770.
Interstate Amusement Co. v. Albert, 239 U. S. 560; 60 L. Ed. 439.
Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94; 63 L. Ed. 863.
Smiley v. Kansas, 196 U. S. 447; 49 L. Ed. 546.

D. Under the law of sales, delivery of goods by a consignor to a common carrier for account of the consignee has effect as delivery to such consignee.

United States v. R. P. Andrews & Co., 207 U. S. 229; 52 L. Ed. 185.
Golo Slipper Co. v. Hamilton Shoe Stores Co., 43 F. (2d) 33.
Garretson v. Selby, 37 Iowa 529.
Iowa Uniform Sales Act, Rule 4 (2) Section 19 and Section 46 (1), Code of Iowa 1939, Sections 9948, 9975.
Nonotuck Silk Co. v. Adams Express Co., 256 Ill. 66.

E. The due process clause of the Fourteenth Amendment to the Constitution of the United States prohibits the extra-territorial operation of a state law.

Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. Ed. 297.
Pennoyer v. Neff, 95 U. S. 714; 24 L. Ed. 565.
Hartford Acc. & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143; 78 L. Ed. 1178.
Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. Ed. 664.
New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. Ed. 772.
New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. Ed. 926.

James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. Ed. 155.
Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. Ed. 1032.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. Ed. 847.

F. The due process clause of the Fourteenth Amendment prohibits a state from regulating the out-of-state activities of a foreign corporation under the guise of regulating the privilege granted such corporation to do business within the state.

New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Connecticut Gen. Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
Terral v. Burke Construction Co., 257 U. S. 529; 66 L. Ed. 352.

G. Because of differences in point of fact, the following cases relied upon by petitioners are not controlling:

McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565.
McGoldrick v. A. H. DuGrenier, Inc., and
McGoldrick v. Felt & Tarrant Co., 309 U. S. 70; 84 L. Ed. 360.
Monamotor Oil Co. v. Johnson, 292 U. S. 86; 78 L. Ed. 1141.
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62; 83 L. Ed. 488.
Jagel's, "A Fuel Corp." v. Taylor, 309 U. S. 619; 84 L. Ed. 983.

H. The sales at respondent's mail order establishments were consummated without the State of Iowa.

Graybar Elec. Co. v. Curry, 308 U. S. 513.
Wiloil Corp. v. Pennsylvania, 294 U. S. 169; 79 L. Ed. 838.

II.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Impose a Tax upon its Gross Receipts from Activities Without the State, and Therefore Said Act as Thus Applied Violates the Fourteenth Amendment to the Constitution of the United States.

A. Regardless of the name given to the tax by the language of the statute, it is still the duty of the court to consider its real nature and effect.

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292; 59 L. Ed. 236.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346; 67 L. Ed. 297.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 65 L. Ed. 295.

B. Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt, but is a tax.

Bailies v. City of Des Moines, 127 Iowa at 126.
Liberty Mutual Ins. Co. v. Johnson Shipyards Co., 6 F. (2d) 752.

C. The due process clause of the Fourteenth Amendment denies to the State of Iowa power to tax respondent's activities outside the state.

James v. Dravo Contracting Co., 302 U. S. 134; 82 L. Ed. 155.
Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77; 82 L. Ed. 673.
Sears, Roebuck and Co. v. Roddewig (Iowa), 292 N. W. 130 at 132.

III.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to Respondent's Mail Order Business Constitute a Regulation of and Substantial Burden Upon Interstate Commerce, and an Impairment of the Free Flow of Such Commerce, and Are, Therefore, Violative of Section 8 of Article I of the Constitution of the United States.

A. Transactions consummated by respondent at its mail order establishments in Illinois, Minnesota and Missouri with residents of Iowa, constitute interstate commerce.

Heyman v. Hays, 236 U. S. 178; 59 L. Ed. 527.
Montgomery, Ward & Co. v. Fry (Mich.) 269 N. W. 166.

B. The State of Iowa is not at liberty to regulate, or burden, or impair the free flow of interstate commerce, nor to tax the privilege of engaging in interstate commerce, by exacting a percentage of the gross receipts therefrom.

McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565.
Gwin, White & Prince v. Henneford, 305 U. S. 438; 83 L. Ed. 272.
Puget Sound Stevedoring Co. v. Tax Commissioner, 202 U. S. 90; 82 L. Ed. 68.
Fisher's Blend Station v. Tax Commission, 297 U. S. 650; 80 L. Ed. 956.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292; 62 L. Ed. 295.
Adams Mfg. Co. v. Storen, 304 U. S. 307; 82 L. Ed. 1365.

ARGUMENT.

I.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Violate the Fourteenth Amendment to the Constitution of the United States Because of Their Extra-Territorial Operation.

From the undisputed facts hereinbefore set forth, this court will have observed that the only transactions involved in this case are what are referred to as "mail order sales" consummated by respondent at its mail order establishments, each of which is located outside the State of Iowa. These sales are the result of the circulation of catalogs by respondent through the United States mail from one or the other of its said mail order establishments to individuals resident within the State of Iowa, and are initiated by an order made out by a resident of Iowa and forwarded by mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. The transaction is consummated by the delivery at respondent's mail order houses located without the State of Iowa to such customer by delivery to the United States mail or other common carrier service, as designated by such customer, of the goods so ordered. Under these facts, the Iowa Supreme Court held (R. 97, 98; 292 N. W. at 135):

> "The only activities of plaintiff involved herein are the sales made pursuant to its mail order business. As to all other activities, for the purposes of this case, plaintiff concedes that the tax must be paid and it has been collected and paid. The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the State. The sales are consummated outside the State of Iowa in each instance. They are separate and

distinct from plaintiff's activities in Iowa. The statute here challenged seeks to impose upon plaintiff the obligation that it 'shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.' The sales are made outside of Iowa and the statute requires plaintiff to collect the tax at the time the sales are made. It clearly seeks to regulate activities of plaintiff outside the state. Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa."

The foregoing finding of the Supreme Court of Iowa that—

> "The mail order sales, however, do not constitute activities within the State of Iowa, nor do such sales constitute doing business within the state. The sales are consummated outside the State of Iowa in each instance. They are separate and distinct from plaintiff's activities in Iowa."—

is binding upon this court for, as said by this court in *Chrisman v. Miller*, 197 U. S. 313, 49 L. Ed. 770,

> "In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final."

In *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 60 L. Ed. 439, this court refused to disturb the finding of the Supreme Court of Tennessee that business was being done within that state, and said:

> "It is settled that such findings of fact, in ordinary cases other than those arising under the 'contract clause' of the Constitution, are binding upon this court.
> * * *
>
> There being adequate support in the record for the finding of the supreme court of the state that plaintiff in error was doing business in the state, other than in-

terstate commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process clause alike must fall."

In *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 63 L. Ed. 863, this court said:

> "Plaintiff in error contends that the court erred in construing the ordinance as imposing the tax with respect to the poles standing upon the railroad right of way, and especially as to the 35 poles which, at the time of acceptance of the ordinance, were without the limits of the city. But as no question is raised here under the contract clause of the Constitution, we are not at liberty to revise the decision of the state court upon the question of construction, and can only determine whether, as construed and applied, the ordinance deprives plaintiff in error of rights secured by other provisions of the Constitution and laws of the United States."

And the State Supreme Court's construction of its own statutes and its findings of fact in connection therewith are accepted by this court even though the state court applies a rule of construction not theretofore recognized here. *Smiley v. Kansas*, 196 U. S. 447, 49 L. Ed. 546.

That the foregoing findings of fact by the Supreme Court of Iowa had ample and adequate support in the evidence, is apparent from the statement of facts heretofore made and, furthermore, such findings are in complete accord with principles of the general law of sales as well as decisions of this court and of prior decisions of the Supreme Court of Iowa. The court will recall that in each instance involved in this case the transaction is initiated by an order made out by a resident of Iowa and forwarded by United States mail to respondent's mail order establishment outside the state together with remittance covering the purchase and the cost of and specifying the means of transportation. Surely it is apparent that in such initiation

of the transaction respondent performed no activity of any kind. Such order being accepted by respondent at its mail order establishment outside the state, the transaction is consummated outside the state by delivery, to the United States mail or other common carrier service as designated by such customer, of the goods so ordered. Such delivery to a designated carrier becomes, in legal effect, a delivery outside the state to such customer for, as said by this court in *United States v. R. P. Andrews & Co.*, 207 U. S. 229, 52 L. Ed. 185:

> "That, as a general rule, the delivery of goods by a consignor to a common carrier, for account of the consignee, has effect as delivery to such consignee, is elementary. That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question."

In *Golo Slipper Co. v. Hamilton Shoe Stores Co.*, 43 F. (2d) 33, the Circuit Court of Appeals of the Tenth Circuit said:

> "It is settled law that, in the absence of a different agreement, delivery to a carrier at the location of the seller constitutes delivery to the purchaser, and title vests in the latter at that time. *Delaware, L. & W. R. Co. v. U. S.*, 231 U. S. 363, 58 L. Ed. 269."

And the Supreme Court of Iowa in the early case of *Garfetson v. Selby*, 37 Iowa 529, announced the same rule in the following language:

> "The rule of law applicable to cases of this character is well stated in *Whiting v. Farrand*, 1 Conn. 60 as follows: 'When a contract is made for the sale of goods which are not delivered, but are to be sent to the purchaser, if the vendor send them in the mode agreed on or directed by the purchaser * * * then the goods during the voyage are at the risk of the purchaser."

And these conclusions are in strict accordance with the provisions of the Uniform Sales Act adopted in Iowa in 1919 as disclosed by Rule 4 (2) of Section 19 and Section 46 (1) of said Act. See also—

Nonotuck Silk Co. v. Adams Express Co., 256 Illinois 66.

Upon such facts and considerations the Iowa Supreme Court concluded:

> "Under the provisions of Section 6943.122, defendants seek to cancel plaintiff's license as a retailer in this state and its permit to do business here as a foreign corporation for failure to pay a debt which constitutes a regulation of its activities outside of Iowa. Under repeated pronouncements of the Supreme Court of the United States, hereinbefore reviewed and quoted from, the State of Iowa has no such right." (R. 144)

This conclusion, we submit, is entirely in accord with the controlling applicable decisions of this court.

In *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, this court, in an opinion rendered January 31, 1938 and written by Mr. Justice Stone, had under consideration the validity of a tax laid by the State of California on the receipt by appellant in Connecticut of insurance premiums during the years 1930 and 1931 upon reinsurance contracts. The contracts were entered into with insurance companies which were doing business in the State of California and which companies had effected life insurance contracts on residents of California. In holding that such tax was invalid as a violation of the limitations prescribed by the Fourteenth Amendment to the Federal Constitution, the court said:

> "As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the

power to lay it. Hence, it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * *"

In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. Ed. 297, the court, speaking through Justice Holmes, said:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

These decisions of this court are merely a restatement of the long-settled rule that the sovereign powers of a state are limited to its territorial boundaries.

In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, this court said:

> "The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. L., ch. 2; Wheat. Int. L., pt. 2, ch. 2. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

Nor may the power of the state to regulate activities performed without the state be enlarged because one of the parties to such activities is a citizen of such state.

Hartford Accident & Ind. Co. v. Delta & P. Land Co., 292 U. S. 143, 149; 78 L. Ed. 1178.

Nor is the power of the state to so regulate such activities performed outside the state enlarged merely because such activities involve contracts relating to property within the state.

Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; 70 L. Ed. 664.

See also:

New York Life Ins. Co. v. Dodge, 246 U. S. 357, 375; 62 L. Ed. 772.
New York Life Ins. Co. v. Head, 234 U. S. 149, 164; 58 L. Ed. 1259.
Home Ins. Co. v. Dick, 281 U. S. 397, 407; 74 L. Ed. 926.
James v. Dravo Contracting Co., 302 U. S. 134, 139; 82 L. Ed. 155.
Baldwin v. Seelig, 294 U. S. 511, 521; 79 L. Ed. 1032.
New York, Lake Erie & Western Ry. Co. v. Pennsylvania, 153 U. S. 628; 38 L. Ed. 847.

And the constitutional limitation upon the power of the state to regulate activities outside its borders may not be avoided under the guise of a license or otherwise.

In *New York Life Ins. Co. v. Head*, 234 U. S. 149, 164; 58 L. Ed. 1259, the court, speaking by Mr. Chief Justice White, said:

> "It is true it has been held that, in view of the power of a state over insurance, it might, as a condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the state, which otherwise, but for the complete power to exclude, would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever, for any purpose, to go in without a license, would not be heard, after accepting the same, to complain of exactions upon which the license was conditioned as unconstitutional, because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary implication overruled, or at all events, so restricted as to deprive it of all ap-

plication to this case (see *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318, 332, 34 S. Ct. 333, 58 L. Ed. [621, 626] [L. R. A. 1915F, 1187], and authorities there cited), it here can have no possible application since such doctrine, at best, but recognized the power of a state, under the circumstances stated, to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. *But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise from exercising powers not possessed.*" (Italics ours)

In *Connecticut General Life Ins. Co. v. Johnson, supra,* this court said:

"No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the state. Nor could it be, for it appears that appellant had conducted its business in California under state license for many years before the taxable years in question and before the taxing act was construed by the highest court of the state, in *Connecticut Gen. L. Ins. Co. v. Johnson, supra,* to apply to premiums received in Connecticut from reinsurance contracts effected there. A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law. *Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr)* 272 U. S. 494; 71 L. Ed. 372, 47 S. Ct. 179, 49 A. L. R. 713; compare *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. Ed. 1112, 43 S. Ct. 636."

See also in *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, the court said:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's

> doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."

Nor is the power of the state to regulate activities so performed without its borders by a foreign corporation qualified to do business in the state enlarged because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

In *Connecticut General Life Ins. Co. v. Johnson, supra,* it is said:

> "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

Under the undisputed facts, and under the findings of fact by the Supreme Court of Iowa, then, we submit the decision of that court, that the collection and payment provisions of the Iowa Use Tax Act as construed and administered by the petitioners and as applied to the mail order sales of respondent constitutes the regulation of activities of respondent outside the State of Iowa and is therefore void, is in accordance with the foregoing controlling and applicable decisions of this court and, therefore, should be affirmed.

Nor is this conclusion contrary to certain cases relied upon by petitioners in their brief and in the court below and which we shall presently consider, for the reason that in each of such cases there was in fact a "local activity"

or "jurisdictional incident" performed within the confines of the taxing authority.

One of such cases so relied upon by petitioners is *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, where the respondent, who was the seller, had agreed to make deliveries to customers in New York City as part of its contracts of sale. It appeared "all the sales contracts with the New York customers in question were entered into in New York City, and with two exceptions, presently to be considered separately, called for delivery of the coal by respondent by barge, alongside the purchasers' plants or steamships * * *. All the deliveries, with the exceptions already noted, were made within New York City." (at page 44) Justice Stone, speaking for the majority of this court pointed out (at page 50) that this court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods "*effected by delivery* to the purchaser upon arrival at destination after an interstate journey,", and, specifically with reference to the New York City sales tax, said (at page 58):

> "*Here the tax is conditioned upon a local activity, delivery of goods within the state* upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power." (Italics ours)

In the dissenting opinion written by Mr. Chief Justice Hughes the "local activity" or "jurisdictional incident" which justified the imposition of the New York sales tax was expressly recognized as the physical delivery by the seller of the coal in New York City, for it is there said:

> "It is urged that there is a taxable event within the state. That event is said to be the delivery of the coal. * * *
>
> It is said that title to the coal passes to the purchaser on delivery."

But in this case, as we have pointed out, there was no local activity and therefore no jurisdictional incident performed by respondent in connection with any of the transactions within the State of Iowa: and so the Supreme Court of that state has expressly found the facts.

Even in *McGoldrick v. Berwind-White Coal Mining Co., supra,* the court expressly noted two classes of sales which were not governed by its decision. In the two classes noted as exceptions by this court, delivery was made by the seller to a carrier for the buyer outside of New York City "in one case f.o.b. at the mines in Pennsylvania, and in the other at the pier in Jersey City, New Jersey, and deliveries were made accordingly." With respect to these transactions, this court said (at pages 58 and 59):

> "Respondent asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon 'any transaction originating and/or consummated outside the territorial limits of the City. * * * This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.
>
> "Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation in this Court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

In the companion cases of *McGoldrick v. A. H. DuGrenier, Inc.* and *McGoldrick v. Felt & Tarrant Co.*, decided together and reported at 309 U. S. 70, 84 L. Ed. 360, also relied upon by petitioners, this court indicated the "jurisdictional event" to be the transfer of possession to the purchaser within New York City pursuant to orders taken within that city, saying (at page 77):

"In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city and *possession of which was transferred to the purchaser there.* Decisions in both is controlled by our decision in the *Berwind-White Coal Min. Co.* case. For reasons stated at length in the opinion in that case the tax so laid does not infringe the commerce clause." (Italics ours)

Thus, the "jurisdictional event" was specifically stated to be the transfer of possession, or delivery, within the city. This conclusion is confirmed by the reference to the *Berwind-White* case where the "jurisdictional event" was physical delivery by the seller in New York City.

In the *Felt & Tarrant* case it appeared that the respondent maintained an office in New York City from which its agents sold in the city orders for comptometers which were forwarded to the Illinois office for approval. Upon acceptance of such order each machine was invoiced to the purchaser "and shipped to the New York City office of respondent's sales agent, where it is inspected, tested and adjusted, *and then delivered to the purchaser.*"

Thus, as in the *Berwind-White Coal Min. Co.* case, the "local activity" or "jurisdictional incident" consisted of physical delivery by the respondent to the purchaser within New York City.

In the *DuGrenier, Inc.* case it appeared that machines manufactured by respondent in Massachusetts were "sold throughout the United States by an exclusive sales agent, the respondents' Stewart & McGuire, Inc., having an office in New York City. The sales in the city, *"when not of machines located at the New York office"* were effected through solicitation of orders by the agent which were forwarded to the Massachusetts office and if accepted were filled by shipping the purchased machine by rail or truck direct to the purchaser in New York City who paid the freight.

Thus it appears that there was a physical delivery of the

machines, when such were located at the New York office, to the purchaser in New York City, and it was only when machines were not on hand at the New York office that orders were filled by shipments from without the state. Such shipments, then, were purely incidental to the transaction and were made for purposes of convenience on the part of the seller. In such a case it is quite obvious that the purchaser, ordering goods from the seller or his agent located within the same state, has no particular concern whether his order be filled from stock within or without the state. The sales, then, were New York City sales and as such subject to the taxing jurisdiction of New York City.

This court considered the nature of similar transactions in *Graybar Electric Co. v. Curry*, 308 U. S. 513, which case affirmed the judgment of the State Supreme Court (238 Ala. 116, 189 So. 186), where it was said:

> "The sales were Alabama sales. The means by which, and the place from which, the complainant obtained the goods to fulfill its contract were but incidents in the transaction, and cannot serve to change the status of the transactions. The consumers had no dealings with the non-resident manufacturers. Their contracts were with the complainant in Alabama for the sale and delivery of the goods to them in Alabama."

In *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169, 79 L. Ed. 838, this court considered facts similar to those appearing in the *DuGrenier, Inc.* case. There it appeared (at page 172) that:

> "Appellant, a Pennsylvania corporation having its principal place of business in Pittsburgh, sells liquid fuels at wholesale and is a distributor as defined by the act. The tax in controversy was laid at three cents per gallon upon the contents of 13 tank cars sold and delivered by it. All were ordered through its agent in Philadelphia for delivery to purchasers at that city or at Essington, Pennsylvania. The orders specified a price per gallon 'f.o.b. Wilmington, Del., plus 3c tax,'

> and were subject to, and received, appellant's approval at its office in Pittsburgh."

It further appeared that there was no selection of goods by purchasers and that appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect performance by shipping from any place within or without Pennsylvania. Upon these facts the court said: (at page 175)

> "Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. If interstate transportation was not required or contemplated, it may be deemed as merely incidental."

So, in the *DuGrenier* case, the interstate shipment on some occasions of the goods to purchasers in New York City was merely incidental, but in the instant case respondent not only did not but could not fill the orders from sources within the State of Iowa. It had no facilities for doing so. Each of the transactions between it and its purchasers contemplated the shipment of such goods from without the state. Thus, we submit, because of the difference in point of fact, the *DuGrenier, Inc.* case constitutes no authority for the position of petitioners.

In *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. Ed. 1141, also relied upon by petitioners, this court sustained an act of Iowa requiring distributors of gasoline to collect a tax on gasoline distributed to users in the State of Iowa. An examination of that decision will disclose that this court neither considered nor decided the validity of the act there involved because of its extra-territorial application, for the very simple reason that there was no extra-territorial activity involved. The Monamotor Oil Company, an Arizona corporation, had its bulk stations and refinery in Iowa. It was a distributor within the meaning of the Iowa Motor

Fuel Tax Act, and had procured a license from the treasurer of state as such distributor. It was actively engaged in the distribution of gasoline in the State of Iowa. That was its activity. On some occasions sales were completed by shipment from Oklahoma direct to purchasers in Iowa but the Monamotor Company, as in *Wiloil Corp. v. Pennsylvania, supra,* was free to effect performance of such contracts of sales by shipments from its bulk stations and refinery located in Iowa, and, if interstate transportation was not required or contemplated, it was merely incidental. Furthermore, this court in that case expressly reserved the decision of the question whether in other circumstances then disclosed by the record in that case, the revocation of the license might constitute a denial of due process in violation of the Fourteenth Amendment, and, in this connection, said:

> "The revocation of the appellant's license by the state treasurer without notice and hearing did not deprive it of property without due process in violation of the Fourteenth Amendment. Whether in other circumstances the license contemplated by the statutes under consideration might be considered property within the protection of the due process clause we need not determine. It is sufficient in this case to advert to the undisputed facts disclosed by the record. The law imposes no penalty for conducting the business of a distributor without a license; the only penalties mentioned are for failure to report gasoline intended for use in the state, and to pay the tax. The state officers have not sought to prevent the appellant from continuing its business as a distributor, and have in this proceeding, both by answer and by evidence, avowed their purpose to take no further action against the appellant, either criminal or civil, until the conclusion of the civil suit now pending in a state court to recover the tax, the failure to pay which was the ground of revocation of the appellant's license. The state's officials are prosecuting the action as a test suit. There is therefore no threat of immediate harm as a result of the re-

vocation of the license, and the action of the state treasurer in revoking it cannot affect the pending civil suit or any other action civil or criminal which may hereafter be brought."

How different are the facts here. This court knows the very drastic penalties prescribed by Iowa law on account of the conduct of business within its boundaries by a foreign corporation without first procuring a permit so to do, and this court knows also that under the Iowa Retail Sales Tax Act every retail merchant is prohibited from engaging in business until he has first procured a permit from the Iowa Board of Assessment and Review so to do. The very action enjoined here is the revocation of the right of respondent to engage in its business as a retail merchant in the State of Iowa, whereas in the *Monamotor Oil Company v. Johnson* case, it is expressly stated that:

> "The state officers have not sought to prevent the appellant from continuing its business as a distributor, and have in this proceeding, both by answer and by evidence, avowed their purpose to take no further action against the appellant, either criminal or civil, until the conclusion of the civil suit now pending in the state court to recover the tax, the failure to pay which was the ground of revocation of the appellant's license."

In *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, also relied upon by petitioners, there was involved the collection of a use tax on property sold by the appellant through its general agents who were doing business in California, and this court, in stating the facts, quoted from the decision of the lower court, 23 Fed. Supp. 186 as follows:

> "That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As

soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers."

Indeed, the seller's contract in that case expressly provided that deliveries must be made by the seller. Plainly then, the "local activity" or "jurisdictional incident" justifying the enforcement of that act was amply disclosed as a matter of fact by the record.

Petitioners also rely upon *Jagels, "A Fuel Corporation," v. Taylor*, 309 U. S. 619, 84 L. Ed. 983. Originally in this case the Appellate Division of the Supreme Court of New York affirmed without opinion the determination of the Comptroller of New York, and the facts are stated in a dissenting opinion by Judge Martin, 255 App. Div. 965, 8 N. Y. S. (2d) 456. The judgment was affirmed without opinion by the New York Court of Appeals, 280 N. Y. 766, 21 N. E. (2d) 526, and this court also affirmed without opinion. In summarizing the facts, the court said:

> "Its principal business calls for *delivery of coal in the centrally located section of New York City*, but, should a customer want delivery outside of this territory, the petitioner has delivery made on its account from yards of associated dealers located within the city." (Italics ours)

Thus, it is apparent that the seller was able to supply coal from stocks of associated dealers within the city, and an interstate shipment from New Jersey was not essential for filling an order.

In addition, it appears that the contract of sale required delivery in New York City to be made by the seller. Peti-

tioners contend that the third type of sales in this case supports their view, but the Court of Appeals plainly describes this type as:

> "A written order was sent by the purchaser in New York to the New Jersey office, *and delivery was made from the New Jersey yard to the consumer in New York.*" (Italics ours)

Likewise, in the further statement of facts in the dissenting opinion of Judge Martin, the jurisdictional event is indicated as delivery in New York, as follows:

> "Here the offer is made in New York, accepted in New Jersey, and *calls for performance by delivery in New York*, of a product which, by reason of its nature, originates in Pennsylvania and does not come within the State of New York until *delivery is made by the petitioner* from its New Jersey yard." (Italics ours)

Thus it appears that a local activity by the seller, such as delivery of the physical property to the purchaser within the confines of the taxing state, is a necessary prerequisite as a matter of fact to the justification of the exercise of either the taxing or regulatory powers of the state of the purchaser's residence, and, as we have pointed out, under the undisputed facts hereinbefore set forth, there was neither physical delivery of the goods by respondent as the seller nor any other local activity by it performed within the State of Iowa with respect to the transactions involved. The receipt of the orders with the purchase price and transportation charges including the designation of method of shipment by the purchaser at the mail order establishment of respondent without the state, the acceptance thereof there, the filling of such orders there, and the direct shipment of the goods covered by such orders to such customer from such mail order houses without the state, establishes that the respondent performed no local activity with respect to such transactions within the State of Iowa. De-

livery through the United States mail or other common carrier of such direct shipments constituted delivery to such purchasers at the places of business of the mail order houses of respondent, all of which were without the state.

So, because of the differences in point of fact, the foregoing cases do not constitute controlling authority justifying the reversal of the decision of the Supreme Court of Iowa; for the cases just referred to indicate the farthest point to which this court has gone in sustaining state jurisdiction over a non-resident seller for taxation or regulation in connection with interstate sales, is where the seller makes delivery to the buyer or performs some other activity in connection with the particular transaction in the state asserting jurisdiction to so tax or regulate.

For all of the foregoing reasons, we submit that the application of said Iowa Use Tax Act to the mail order business of respondent conducted at its mail order establishments in Illinois, Minnesota, and Missouri, infringes the due process clause of the Fourteenth Amendment to the Federal Constitution, which prohibits the extra-territorial operation of a state law, and that, therefore, the decision of the Supreme Court of Iowa was correct and should be affirmed.

II.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to the Mail Order Business of Respondent Impose a Tax upon its Gross Receipts from Activities Without the State, and Therefore Said Act as Thus Applied Violates the Fourteenth Amendment to the Constitution of the United States.

The requirement of the Iowa Use Tax Act (Sec. 6943.109, Code of Iowa, 1939) that respondent collect the tax at the time of making its mail order sales outside the State of Iowa, and the provision that such taxes so required to be col-

lected shall constitute a debt owing by the respondent to the State of Iowa (Sec. 6943.112, Iowa Code of 1939), in legal effect imposes a tax upon the activities of respondent outside the state, and thereby violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

While in Section 2 of the Iowa Use Tax Act the tax is described as one levied upon the use in the State of Iowa of tangible personal property, it is a matter of no consequence what name may be given to the tax by the language of the statute. It is still the duty of the court to consider its real nature and effect.

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 236.
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 65 L. Ed. 295.

And, bearing this rule in mind, as well as the fact that under the express terms of Section 8 of said Act, the tax is really exacted at the time of making said mail order sales without the state, and is measured by the gross purchase price for the commodities so sold; and bearing in mind also the fact that respondent cannot collect from its mail order purchasers all of said tax, it is, nevertheless, subjected to a liability for the full amount thereof. We earnestly contend then that the tax thus provided, as applied to respondent's mail order business conducted in its mail order establishments without the state, is not a use tax at all, but is a sales or gross receipts tax, operating upon sales so made by respondent outside the State of Iowa. Therefore, it is a tax upon extra-territorial activities of respondent.

True, in Section 11 of said Act, the amount of such tax is described as constituting a "debt" owed by the retailer to the State of Iowa, but the use of such language does not

change the nature of the exaction. A debt is an obligation founded on contract or agreement, either express or implied. Where an impost is levied by authority of a government upon its citizens or subjects for a governmental purpose, it is not a debt, but is a tax. An examination of the Iowa Use Tax Act will show that the tax therein provided is for general governmental purposes.

In *Bailies v. City of Des Moines*, 127 Iowa 124 at 126, the court, in considering this question said:

> "The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement, but operates *in invitum*. Whereas a debt is a sum of money due by certain and express agreement, and originates in or is founded upon contracts express or implied. In *Meriwether v. Garrett*, 102 U. S. 472, (26 L. ed. 197), it is said: 'A tax is a charge imposed by the Legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in volume 2, Words and Phrases, page 1883."

In *Liberty Mutual Ins. Co. v. Johnson Shipyards Co.*, 6 F. (2d) 752, it was held:

> "A 'debt' is a sum of money due on contract, express or implied, or one which is evidenced by a judgment; and 'taxes' are not debts but imposts levied by government for its support or for some special purpose which the government has recognized, and are due to the government in its sovereign capacity, while debts are due to the government in its corporate capacity."

And where such tax is upon activities which were carried on without the territorial limits of the state, it has no jurisdiction to impose the same.

In *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, the court had under consideration the validity of a statute of West Virginia imposing an annual privilege tax upon the business of contracting. The Contracting Company in that case had four contracts with the United States Government for the construction of locks and dams in the Kanawha River and locks in the Ohio River, a part of activities in connection with which were performed in the State of West Virginia but other parts of activities in connection with which were performed outside the State of West Virginia, and, in deciding the question whether the state had the territorial jurisdiction to impose the tax measured by the gross receipts of the Contracting Company under such contracts, this court, speaking by Mr. Chief Justice Hughes, said:

> "As to Territorial Jurisdiction.—Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax. * * *
>
> A large part of respondent's work was performed at its plant at Pittsburgh. The stipulation of facts shows that respondent purchased outside the State of West Virginia materials used in the manufacture of the roller gates, lock gates, cranes, substructure racks and spur rims, structural steel, patterns, hoisting mechanism and equipment, under each of its contracts, and fabricated the same at its Pittsburgh plant. The roller gates and appurtenant equipment were preassembled at respondent's shops at Pittsburgh and there were inspected and tested by officers of the United States Government. The materials and equipment fabricated at Pittsburgh were there stored until time for delivery, and the appropriate units as prepared for shipment were then transported by respondent to the designated sites in West Virginia and there installed.
>
> * * *
>
> It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania."

The due process clause of the Fourteenth Amendment to the Federal Constitution denies the State of Iowa the power to impose a tax upon respondent's gross receipts realized from the conduct of its mail order business at its establishments outside the State of Iowa. This court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, speaking to this question, said:

> "But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. * * * It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The Supreme Court of Iowa in its opinion, in speaking to this question, said:

> "Defendants contend that the tax is a tax upon the use of property in this state, is really a tax upon the purchaser and is not a tax upon the plaintiff at all. Perhaps from a subtle and technical standpoint this may be true, but, if true, it is unimportant. Section 6943.109 requires that the tax be collected when the sale is made. Under the facts herein, the property is then without the state. Section 6943.112 makes the amount of the tax a debt owed by plaintiff and Section

6943.122 provides that a failure to pay that debt shall constitute proper grounds for revoking plaintiff's permit to do business in this state. From any reasonable or practical standpoint, the amount of the tax being made a debt of plaintiff, the statute at least constitutes regulation of plaintiff's activities outside the state as a condition to it being granted a license to do business in the state. This cannot be done." (Record, 136; 292 N. W. 132)

We submit that this conclusion of the Supreme Court of Iowa is in accord with the foregoing applicable and controlling decisions of this court, and its decision that the State of Iowa was without power to impose or levy this tax on account of respondent's mail order sales consummated entirely outside the borders of Iowa, should be affirmed.

III.

The Collection and Payment Provisions of the Iowa Use Tax Act as Applied to Respondent's Mail Order Business Constitute a Regulation of and Substantial Burden Upon Interstate Commerce, and an Impairment of the Free Flow of Such Commerce, and Are, Therefore, Violative of Section 8 of Article I of the Constitution of the United States.

Every single transaction resulting in a purchase from and sale at respondent's mail order houses located in the states of Illinois, Minnesota and Missouri to residents of the State of Iowa, is a transaction in interstate commerce. As we have pointed out, the inception of such transaction is the sending of an order by United States mail from Iowa to such other state, the remittance of the purchase price by United States mail from Iowa to such other state, the acceptance of such order in such other state, and the shipment of the tangible personal property either by United States mail or other public carrier across the state line in-

to Iowa. Although the right of respondent to engage in such interstate business does not exist because of any authority from the state of Iowa, nevertheless, by Section 8 of said act, it is required *"at the time of making such sales"* to collect the tax imposed by the act.

The interstate character of the mail order business has been specifically recognized by this court.

Heyman v. Hays, 236 U. S. 178, 59 L. Ed. 527.

See also:

Montgomery, Ward & Co. v. Fry (Mich.) 269 N. W. 166.

As we have heretofore pointed out, the record abundantly shows that even if it tried to collect such tax from its customers it could not do so in full. These mail order sales are not face-to-face transactions. They are transactions conducted at a distance. Obviously, it would be much more difficult to effect the collection of the tax on such distant transactions than is true in connection with the collection of the Iowa retail sales tax which involves face-to-face transactions.

Respondent received a large number of mail orders every day at its said mail order establishments and puts them through its plant on a time schedule and there is no allowance or arrangement for withholding orders from such schedule. It would substantially increase the cost of operating respondent's business to hold orders which did not include an amount representing such use tax in suspense, and would require a major rearrangement of the character of the business (R. 57).

We have heretofore shown the substantial character of the burden cast upon respondent by the collection and payment provisions of the Iowa Use Tax Act. Such burden is shown by the record without dispute to amount to many thousands of dollars per year, and such burden results,

insofar as the sales consummated from the mail order establishments of respondent in Illinois, Minnesota and Missouri to residents of Iowa are concerned, in the imposition of a gross receipts or gross percentage tax operating upon transactions in interstate commerce. Such being the case, the State of Iowa is not at liberty to tax the privilege of engaging in interstate commerce by exacting in return therefor a percentage of the gross receipts.

While sustaining the principle that delivery by the seller within a state immediately following interstate transportation, is an event or incident investing such state with jurisdiction for tax and regulatory purposes, this court, in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565 reiterated but distinguished the proposition that a state tax upon receipts derived from interstate commerce is an infringement of the commerce clause, stating:

> "It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by interstate commerce. See *Western Live Stock v. Bureau of Revenue, supra* (303 U. S. 255, 82 L. ed. 827, 58 S. Ct. 546, 115 ALR 944); *Gwin, White & Prince v. Henneford, supra* (305 U. S. 434, 83 L. ed. 276, 59 S. Ct. 325)."

In the case of *Gwin, White & Prince v. Henneford*, 305 U. S. 438, 83 L. Ed. 272, 276, the opinion states:

> "But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which

extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

But it is firmly established by controlling decisions of this court that under facts such as here disclosed the State of Iowa is without power to impose such a burden or to impair or regulate the free flow of such interstate commerce.

In *Puget Sound Stevedoring Co. v. Tax Commissioner*, 302 U. S. 90, 82 L. Ed. 68, the court had under consideration a statute of the State of Washington which imposed a tax for the privilege of engaging in business activities within the state at the rate of ½ of 1% of the gross income from such business. The Puget Sound Stevedoring Company entered into a contract for the loading and discharging of vessels which were engaged in interstate and foreign commerce, and the court held that the performance of such work by a stevedore was as indispensable an agency of commerce as a ship-owner or master, and therefore that such work constituted interstate commerce. In holding that the Washington statute contravened the provisions of Section 8 of Article I of the Constitution of the United States, the court, speaking by Mr. Justice Cardozo, said:

"The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 341, 342, 30 L. ed. 1200, 1203, 1204, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*,

210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126; *Matson Nav. Co. v. State Bd. of Equalization*, 297 U. S. 441, 444, 80 L. ed. 791, 794, 56 S. Ct. 553; *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608."

In *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. Ed. 956, the court had under consideration a statute of the State of Washington which imposed an occupation tax measured by gross receipts from a radio broadcasting station, the broadcasting waves of which were projected across state lines, and in an opinion by Mr. Justice Stone the court held:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 S. Ct. 1380, 2 Inters. Com. Rep. 134; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126."

In *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, there was involved a state tax upon the business of selling goods in foreign commerce measured by gross receipts for goods so sold and shipped, and such tax was pronounced an impost upon exports and therefore without the power of the state to lay because of the provisions of Section 8 of Article I of the Constitution of the United States investing the Congress with exclusive power to regulate foreign commerce. In the course of the opinion the court said:

> "Nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding for the

use of the State a part of every dollar received in such transactions."

In *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. Ed. 1365, there was involved a statute of Indiana laying a gross receipts tax upon all sales of a manufacturing company located in that state. In an opinion by Mr. Justice Roberts, the court held that such tax constituted an unlawful burden upon interstate commerce and violated Article I, Section 8 of the Federal Constitution, and said:

"We conclude that the tax is what it purports to be,—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one percent on every dollar received from these sales.

The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

As we have heretofore pointed out, respondent in the conduct of its mail order business in its establishments in Chicago, Minneapolis and Kansas City, is in direct competition with other mail order establishments, neither of which maintains a place of business within the State of Iowa but each of which procures its orders by mail from customers

in Iowa and makes deliveries to its purchasers mainly through parcel post or freight.

It is manifest that the State of Iowa is impotent to impose the obligation to collect the use tax upon such concerns as Spiegel's, Incorporated, the Chicago Mail Order House, National Bellas Hess and Jim Brown Fencing Company, neither of which has any retail establishments in the State of Iowa. It simply cannot reach them. There is no means by which it can assert any authority over them. Their engagement in their business in interstate commerce is a right which they enjoy apart from the control of the State of Iowa. It is true that by Section 9 of the Iowa Use Tax Act such concerns having no place of business within the State of Iowa are naively invited to register as a collecting agent for the State of Iowa, but the record shows that they have not done so, and yet, merely because respondent has qualified to do business in the State of Iowa as a foreign corporation and conducts twelve retail department stores therein, at none of which are any activities performed with respect to mail its order sales consummated from its Chicago, Minneapolis and Kansas City establishments with residents of Iowa, it, by said act, is subjected to said tax while its direct mail order competitors cannot be so subjected, and this very fact would seriously impair respondent's mail order business with residents of the State of Iowa. Plainly, then, the record indisputably shows that the enforcement of said Use Tax Act as to respondent's mail order business at its Chicago, Minneapolis and Kansas City establishments would not only substantially burden transactions in interstate commerce, but would actually impair the free flow of such interstate commerce.

Furthermore, if the State of Iowa can enforce said Use Tax Act as to respondent's mail order business, then every other state in which respondent maintains a retail store might likewise impose such a burden. Furthermore, the

purpose of petitioners in the administration of said Iowa Use Tax Act to impair the free flow of interstate commerce is apparent from the statements contained on page 30 of petitioners' brief, where it is expresaly stated that the protection of local merchants from the competition of interstate sales, such as these mail order sales, is the objective of the law.

There can be no question under the controlling decisions of this court that the State of Iowa may exact from the users of tangible personal property imported into and which has come to rest within its borders, an excise tax because of such use, and the validity of the Iowa Use Tax Act insofar as it imposes such tax upon such users of such property is not involved in this case.

But, it is a far different thing for the State of Iowa, whether for the purpose of protecting its local merchants from interstate competition, or for any other purpose, to undertake to require this respondent to act in another state as its agent in the collection of a tax at the time of making such interstate sales in such other state; for, in so doing, the State of Iowa is placing a burden upon and regulating and impairing the free flow of interstate commerce contrary to the provisions of Section 8 of Article I of the Constitution of the United States.

And, for all of the foregoing reasons, we earnestly submit that the decision of the Supreme Court of Iowa, that said Iowa Use Tax Act as applied to the mail order business of respondent constitutes a regulation of and substantial burden upon interstate commerce and an impairment of the free flow of such interstate commerce and is therefore in violation of the provisions of Section 8 of Article I of the Constitution of the United States, which invests the Congress with exclusive power to regulate commerce with foreign nations and among the several states, is correct and should be affirmed.

CONCLUSION.

We submit, therefore, that under the facts shown by the record in this case, and for the reasons and upon the authorities hereinbefore set forth, the said Iowa Use Tax Act, as applied to the mail order business of respondent, is unconstitutional and void, and the judgment and decision of the Supreme Court of Iowa affirming the trial court in enjoining its enforcement is right and should be affirmed.

Respectfully submitted,

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